Supreme Court, U.S.
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No. 95-1478

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JAY PRINTZ, Sheriff/Coroner,
Ravalli County, Montana,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE CONSTITUTIONAL TEXT 1

II. THIS COURT'S DECISIONS 3

III. THE ACT IMPOSES SUBSTANTIAL BURDENS AND MORE THAN MINISTERIAL DUTIES . . . 5

IV. ADOPTION OF THE CONSTITUTION AND EARLY LEGISLATION 10

V. SEVERABILITY 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES **Page**

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987) . . . 18

Board of Governors of Federal Reserve System v. *Dimension Financial Corp.*, 474 U.S. 361 (1986) 19

Bowsher v. *Synar*, 478 U.S. 714 (1986) 9

Davis v. *Scherer*, 468 U.S. 183 (1984) 9

FERC v. *Mississippi*, 456 U.S. 742 (1982) 3, 4

Fry v. *United States*, 421 U.S. 542 (1975) 5

Holmgren v. *United States*, 217 U.S. 509 (1910) 15

Japan Whaling Association v. *American Cetacean Soc.*, 478 U.S. 221 (1986) 9

Johnson v. *Maryland*, 254 U.S. 51 (1920) 9

Kentucky v. *Dennison*, 65 U.S. (24 How.) 66 (1861) . . . 4

Koog v. *United States*, 79 F.3d 452 (5th Cir. 1996) . . . 18

Lee v. *Weisman*, 505 U.S. 577 (1992) 15

New York v. *United States*, 505 U.S. 144 (1992) 3, 4, 5, 11, 17, 18

Powell v. *McCormack*, 395 U.S. 486 (1969) 15

Prigg v. *Pennsylvania*, 16 Pet. 539 (1842) 4

Puerto Rico v. *Branstad*, 483 U.S. 219 (1987) 5

Romero v. *United States*, 883 F. Supp. 1076 (W.D.La. 1995) 18

Schad v. *Arizona*, 501 U.S. 624 (1991) 1

Suter v. *Artist M.*, 503 U.S. 347 (1992) 8

Testa v. *Katt*, 330 U.S. 386 (1947) 3, 4

United States v. *Lopez*, 115 S.Ct. 1624 (1995) . . 1, 6, 16

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 5

CONSTITUTIONS

U.S. Const., Article I, § 1 2

U.S. Const., Article I, § 8 . . . . . 1, 2

U.S. Const., Article. I, § 8, cl. 4 15

U.S. Const., Article I, § 8, cl. 15 13

U.S. Const., Article II, § 3 2

U.S. Const., Article III 16

U.S. Const., Article IV, § 2 . . . . . 4, 15

U.S. Const., Article IV, § 2, cl. 2 . . . . . 4, 5

U.S. Const., Article VI 2, 3, 15

U.S. Const., Amend. II 14

U.S. Const. Amend. V 14

Mont. Const., Art. II, §12 17

STATUTES

Alien and Sedition Acts, 1 Stat. 577 (1798) 14

22 Stat. 214 (1882) 15

18 U.S.C. § 658 6

18 U.S.C. § 921(a)(20) 10

18 U.S.C. § 921(a)(33) 7

18 U.S.C. § 922(g)(8) 6

18 U.S.C. § 922(g)(9) 6

18 U.S.C. § 922(s)(6)(B) 19

18 U.S.C. § 922(s)(6)(B)(iii) 20

18 U.S.C. § 922(s)(7) 17

18 U.S.C. § 925A 10

18 U.S.C. § 926(a) 19

42 U.S.C. § 6933(a) 16

P.L. 104-208, 110 Stat. 3009 (1996) 6

Mont. Code § 45-8-351(1) 17

OTHER AUTHORITIES

Elliott, J., DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1836) 11

The Federalist No. 16 11

The Federalist No. 36 11

The Federalist No. 45 11

59 F.R. 61639 (Dec. 1, 1994) 10

61 F.R. 47095 (Sept. 6, 1996) 7

General Accounting Office, *Federal Firearms License Data* (1996) 20

General Accounting Office, *Gun Control: Implementation of the Brady Handgun Violence Prevention Act* (1995) 1

Journal of the First Session of the Senate of the United States (April 5, 1790) 13

Jacobs & Potter, *Keeping Guns out of the "Wrong" Hands: The Brady Law and the Limits of Regulation,"* 86 Jour. of Criminal Law & Criminology, No. 1, (1995) 5

La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L. Q. 779 (1982) 10

Madison, James, *Report on Virginia Resolutions* 14

PUBLIC STATUTES AT LARGE (Boston, 1848) 12, 13, 14

Supreme Court Rule 24.1(a) 18

ARGUMENT

I. THE CONSTITUTIONAL TEXT

Respondent eschews any analysis of the constitutional text, offering instead its own subjective version of "political accountability." It ignores that the Constitution, when it imposes duties on States, does so explicitly (Printz Br. 31-33), and that it assigns the execution of federal law to the President and the executive branch. Respondent never suggests the source in the Constitution for the alleged power to commandeer the States to execute federal law.[1]

Congress shall have power "to regulate commerce . . . among the several States," U.S. Const., Article I, § 8, which does not encompass the conscription of sheriffs not engaged in commerce. Regulation of interstate commerce in firearms is within Congress' power, but a sheriff enforcing State criminal law sans federal background checks does not thereby "affect interstate commerce." (US Br. 41.) "We should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Schad v. Arizona*, 501 U.S. 624, 638 (1991) (citation omitted).[2]

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[1] While respondent euphemistically speaks of Congress "asking" CLEOs for help, it asserts the power to haul CLEOs into court on mandamus or injunction actions and to throw them in jail for contempt if they refuse to execute the federal law. *See* district court opinion, Pet. App. 44-45a n. 19; General Accounting Office, *Gun Control: Implementation of the Brady Handgun Violence Prevention Act* 7, 89 (1995) (Department of Justice position).

[2] *Cf. United States v. Lopez*, 115 S.Ct. 1624, 1658 (1995) (Breyer, J., dissenting) ("the statute does not interfere with the exercise of state or local authority").

Respondent asserts that under Article VI, "state and local executive officials may be required to carry out federal obligations." (Br. 15.) Article VI provides that the Constitution and the law "made in pursuance thereof" shall be the supreme law of the land; to assume that the law here was so made begs the question. Executive officials are not mentioned in the next clause, which provides that "the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." Finally, Article VI provides that "the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution." The Framers knew the difference between "support" for the Constitution and "execution" of the law. As Article II, § 3 provides, the President "shall take care that the laws be faithfully executed."

Respondent turns upside down the doctrine of enumerated powers. Article I, § 1 states that "all legislative power *herein granted* shall be vested in a Congress," and § 8 begins, "the Congress shall have power." Under the Tenth Amendment, "the powers not delegated to the United States" are reserved to the States. Yet respondent assumes that Congress has all powers not prohibited to it. The only limit on Congress' power to impose duties on local officials, it asserts, is the "accountability of public officials to the people." (Br. 15.) The text of the Constitution cannot be so simply jettisoned and replaced by the bare assertion that the Brady Act does not undermine accountability.

II. THIS COURT'S DECISIONS

Respondent claims that *New York v. United States*, 505 U.S. 144 (1992), was concerned only with the lack of power of Congress to require the States to enact a federal regulatory program. It disregards this Court's equally-strong admonition that Congress may not require the States to administer a federal regulatory program.[3] *Id.* at 188.

Testa v. Katt, 330 U.S. 386, 389-91 (1947) upheld the duty of State courts to hear certain federal causes of action because Article VI provides that "the judges in every State shall be bound" by federal law. It does not remotely imply that Article VI could require sheriffs to execute federal law.

New York stated that the law in *FERC v. Mississippi*, 456 U.S. 742, 764 (1982) required "*only* consideration of federal standards"; a State could stop regulating utilities and then "it need not even entertain the federal proposals." 505 U.S. at 161-62. Respondent seeks in *FERC* sanction to commandeer the States (Br. 17-18), but *FERC* states: "We hold *only* that Congress may impose conditions on the State's regulation of private conduct in a pre-emptible area." 456 U.S. at 769 n. 32 (emphasis added). The commission was not required to "implement" the regulatory standards. *Id.* at 749-50. The law required dispute adjudication by a State utilities commission, which is part of the "state adjudicatory machinery" and thus subject to Article VI. *Id.* at 760-61.

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[3] While respondent characterizes the take title/damages provisions as requiring States "to devise a *state* solution to a federally identified problem" (Br. 19-20), taking title may be, and writing checks to pay damages certainly is, a ministerial duty.

Respondent argues that the Brady Act does not require the States to make policy and that "this case is controlled by *Testa* and *FERC*, rather than *New York*." (Br. 21.) Yet the Act does require CLEOs to make policy. (*See* part III, *infra*.) *New York* controls this case because two parallel, unconstitutional alternatives are imposed on the States: administer the Brady Act or enact legislation approved by Congress and the BATF.

Respondent tries to erase the "or administer" prong of *New York* by arguing that this Court was concerned only with "administrative *policymaking*." (Br. 21-22.) It reduces the distinction in *New York* to laws "that require States 'to enact a certain policy,' . . . and those that do not." (Br. 23.) This Court's phrase "enact or administer" is cut down to "enact."

Respondent asserts that the Court need not determine the boundaries (if any) on federal commandeering of the States, and does not consider the boundaries set by the text of the Constitution. It exaggerates by asserting that the Brady Act may be found unconstitutional only by resurrection of the view that Congress "has no power to impose on a State officer, as such, any duty whatever." Br. at 33, quoting *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107 (1861).[4] Yet *Dennison* was overruled because it held that a State executive could not be required to extradite a

[4] *Dennison* held that Ohio's governor was not required to extradite a "free man of color" who helped a slave escape to freedom. *Dennison* followed *Prigg v. Pennsylvania*, 16 Pet. 539 (1842), which held that State officers could not be compelled to return slaves despite the mandatory language of the Fugitive Slave Clause, U.S. Const., Art. IV, §2. *Dennison* and *Prigg* ameliorated some of the evil effects of slavery.

fugitive in the face of the mandatory language of the Extradition Clause. U.S. Const., Art. IV, § 2, cl. 2; *Puerto Rico v. Branstad*, 483 U.S. 219, 227-28 (1987).

Respondent appeals to the "temporary nature" of the commands (which last 5 years) and the "crisis of handgun violence."[5] (Br. 34.) *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) rejected an "emergency" exception to the Constitution that would allow President Truman to seize the steel mills to avert a strike which would jeopardize the Korean War effort and the national defense.[6]

III. THE ACT IMPOSES SUBSTANTIAL BURDENS AND MORE THAN MINISTERIAL DUTIES

Congress is not the sole policy maker in this affair. The sheriff's duties require basic policymaking. The sheriff must allocate the resources, personnel, and time to check records, and must determine which State and local records to

[5] In oral argument in *New York*, Justice Kennedy asked: "Could the federal government command that the states take title to all illegal handguns within their borders and be responsible for the damages caused by failing to take title and possession?" Counsel for the United States replied that "it certainly would go much further than what has happened here." (Recording of Oral Argument, National Archives.) *See* Jacobs & Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 Jour. of Criminal Law & Criminology, No. 1, 93, 118-19 (1995) (concluding Act to be ineffective).

[6] *Fry v. United States*, 421 U.S. 542, 548 (1975) upheld emergency wage-and-salary legislation not because it was urgent, but because it applied to both private and public employees and because "unrestrained wage increases . . . could have a significant effect on commerce." *Id.* at 546-47.

check. The ascertainment and opinion letter requirements force the sheriff to decide and apply questions of federal and State law. The sheriff will lose votes and will be sued for perceived mishandling of these activities.[7]

The sheriff, whose duty under the State constitution is to enforce State criminal law, must study and apply federal handgun laws. The sheriff must make legal determinations about whether one is a convicted felon based on the federal test, which incorporates the laws of 50 different states and the federal government. As the district court here found, "Such a determination of the law is not always easily made." (Pet.App. 60a n. 28) (citing cases).

Many criminal records are not available in the NCIC computerized felony records system. Records of restraining orders involving intimate persons must be manually searched and analyzed.[8] Such records may also be found in divorce case files. New § 922(g)(9), *see* § 658, P.L. 104-208, 110 Stat. 3009 (Sept. 30, 1996), prohibits firearm receipt by a person "convicted in any court of a misdemeanor crime of

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[7] *See United States v. Lopez*, 115 S.Ct. 1624, 1638 (1995) (Kennedy, J., concurring) ("citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function").

[8] 18 U.S.C. § 922(g)(8) prohibits receipt of a firearm by a person subject to a court order after a hearing with actual notice, and at which the person had an opportunity to participate, that restrains such person from harassing an intimate partner or child thereof, but only if the order finds that the person is a threat to the physical safety of the partner or child or prohibits use of force against them. The sheriff must check the actual file to make all of these determinations.

domestic violence,"[9] requiring misdemeanor record searches.

Emphasizing that "Brady *requires* that" the CLEO determine whether the purchaser is "prohibited by law" from receiving a handgun, BATF takes an expansive view of the terms "prohibited by law." 61 F.R. 47095 (Sept. 6, 1996). A fugitive from justice includes not just a person who flees a State to avoid prosecution, but also a person who knows that misdemeanor or felony charges are pending and who leaves the State, which includes a person who moves while a traffic ticket is pending. *Id.* at 47098-99. Drug use may be inferred from mere arrests. *Id.* An illegal alien includes a student whose status has expired, but not an alien in "immigration parole" status. *Id.* CLEOs must learn quite a number of legal interpretations before undertaking a search.

Respondent claims that Sheriff Printz' testimony was "speculative." (Br. 37-38 n. 26.) Sheriff Printz presented uncontroverted evidence that the Brady Act imposes impossible duties on the limited law enforcement resources of rural Ravalli County, Montana. (Printz Br. 3-6.) The Act requires interpretation and application of complex federal and State laws. (Printz Br. 8-15.) The district court found that the ascertainment/background check duties entail "substantial undertakings, some involving the exercise of discretion,

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[9] § 921(a)(33) defines "misdemeanor crime of domestic violence" as the use of physical force by a current or former spouse, parent, or guardian of the victim or "by a person similarly situated," but only if the person was represented by counsel and the case was tried by a jury, or the person "knowingly and intelligently" waived those rights. Excluded is a person whose conviction is expunged or set aside, or who has had civil rights restored. Again, the sheriff must carefully study the case file.

which may be performed--if at all--only with great effort and the expenditure of unfunded resources."[10] (Pet. App. at 60a.)

Respondent appeals to the "interpretive guidance" of BATF, the drill sergeant over elected sheriffs.[11] (Br. 36.) But Congress, their commander-in-chief, provided that a "reasonable effort" to ascertain legality necessarily "includ[es] research in whatever State and local recordkeeping systems are available *and* in a national system designated by the Attorney General."[12] Respondent concedes that the duties were imposed because of "CLEOs' access to relevant records," but elsewhere argues that CLEOs need only check federal NCIC computer records.[13] (Br. 34, 38.)

The recordchecking/ascertainment commands "are not the words of a ministerial duty, but the imposition of a duty

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[10] Findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." F.R.Civ.P. 52(a).

[11] BATF is not entrusted with administration of the duties Congress assigned to CLEOs and its opinions are not entitled to deference.

[12] *See Suter v. Artist M.*, 503 U.S. 347, 358 (1992) (federal adoption law conditioning grants to States on "reasonable efforts" to prevent removal of children from homes is "mandatory in its terms"); *id.* at 365 (Blackmun, J., dissenting) ("the 'reasonable efforts' clause imposes a binding obligation on the State, because it is 'cast in mandatory, rather than precatory, terms'").

[13] *Amici* Br. of States of Maryland *et al.* at 5, claims that most checks need be made only via the NCIC. While the Act applies in only 5 of the 13 States on the brief, this is an admission that CLEOs in those 5 States are nullifying the command to check State and local records.

to make an informed judgment." *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 235 (1986) (application of facts to conservation law).[14] *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) found the duty to "exercise judgment concerning facts that affect the application of" law not to be ministerial. "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Id.* at 733. The sheriff's duties here are "anything but ministerial — he is not merely a clerk wearing a 'green eyeshade' as he undertakes these tasks." *Id.* at 748 (Stevens, J., concurring).

The duty to destroy records within 20 days is ministerial, but is not a *de minimis* intrusion lacking constitutional significance. (US Br. 39.) If *de minimis* violations are insignificant, then the States could impose *de minimis* chores on federal officials. Yet a $3 license imposed by a State on a federal employee was unconstitutional without "any consideration of degree but upon the entire absence of power on the part of the States to touch . . . the instrumentalities of the United States." *Johnson v. Maryland*, 254 U.S. 51, 55-56 (1920) (Holmes, J.).

The duty to explain a denial is hardly *de minimis*. Respondent asserts that a sheriff may just check a box on a form claiming the transferee is a felon. Yet the sheriff must designate a specific conviction, and must determine that it is within the scope of the definition of a felony as determined

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[14] *See Davis v. Scherer*, 468 U.S. 183, 197 (1984) (purported "ministerial" duties left "a substantial measure of discretion" because they included application of regulation to facts).

by the laws of potentially 50 States or federal law. 18 U.S.C. § 921(a)(20). The opinion letter must withstand judicial scrutiny, and attorney's fees may be imposed. *See* 18 U.S.C. § 925A.

Respondent claims that Congress funded execution of the Brady Act. (Br. 39.) Yet the funds referred to in fact "may *not* be used to cover costs of conducting presale background checks," i.e., the duties imposed on CLEOs. 59 F.R. 61639, 61645 (Dec. 1, 1994). Congress provided nary a penny for execution of the commands to CLEOs.

IV. ADOPTION OF THE CONSTITUTION AND EARLY LEGISLATION

Respondent's revisionist history of the Framers' intent turns things upside down. Respondent asserts that the Constitution conferred all powers not prohibited rather than the few powers delegated--"the national government was not prohibited from requiring local officials to assist in implementing federal law." (US Br. 25.)

The Framers intended that voluntary cooperation between the States and the federal government would be integral to federalism. *See Amici* Br. of the Council of State Governments *et al.* 21-28 (detailed account of intent of Framers, early legislation, and later enactments); La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L. Q. 779, 1023-26, 1039-46 (1982). Not one of respondent's references to the Framers suggests that Congress could force State or local executive officials to

execute federal law. (Br. 24-31.) The constitutional convention adopted the Virginia Plan, under which Congress would command individuals, not States, and rejected the New Jersey Plan, under which federal laws would be executed by the States. *New York*, 505 U.S. at 164-65.[15]

The Framers never imagined that Congress would coerce State officers to execute federal law. Hamilton suggested that the federal government could, to collect certain taxes, "employ the State officers" and offer them "emoluments." *The Federalist* No. 36, 15 DOCUMENTARY HISTORY 306 (1984). Madison made a similar suggestion, but did not imply the use of coercion, and added that federal powers under the proposed Constitution "are few and defined." *The Federalist* No. 45, *id.* at 479.

In the Virginia ratification convention, Patrick Henry feared oppression by "two sets of tax-gatherers--the state and the federal sheriffs." 3 J. Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 57 (1836). Wilson Nicholas replied that "Congress will employ the state officers and sheriffs" to collect taxes. *Id.* at 127. Nicholas' word choice is significant--"employ," not impress. Henry rejoined: "The sheriff comes to-day as a state collector. Next day he is federal." *Id.* at 168. Henry did not thereby imply,

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[15] In *The Federalist* No. 16, Hamilton argued that, if the federal government was to issue commands to the States, "military coercion" would be required. 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 341 (1983). Thus, the federal government "must carry its agency to the persons of the citizens." *Id. See New York*, 505 U.S. at 164-65.

contrary to respondent, that "sheriffs would be *required* to assist in federal tax collection."[16] (Br. 26 n. 13.)

The First Congress recognized that it had no power over a local sheriff. On September 23, 1789, the same day it passed the Bill of Rights--which included the Tenth Amendment--Congress passed this Resolution:

> That it be recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by the due course of the laws thereof, under the like penalties as in the case of prisoners, committed under the authority of such States respectively; the United States to pay for the use and keeping of such gaols . . . .

1 PUBLIC STATUTES AT LARGE 96, 98 (Boston, 1848). Under respondent's view, Congress could have bypassed the States and commanded the sheriffs to keep federal prisoners in their gaols. Instead, Congress asked for the consent of each State and agreed to pay the cost.[17]

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[16] Madison referred to "gifts and emoluments" in reference to persons "employed by and dependent upon a government." *Id.* at 258. Henry anticipated: "Your rich, snug, fine, fat federal officers--the number of collectors of taxes and excises--will outnumber anything from the states." *Id.* at 323. This hardly anticipates impressment of sheriffs.

[17] Inexplicably, *Amici* Maryland *et al.* recite this resolution and assert that "the Brady Act respects this constitutional principle." (Br. 19.)

In response to this early example of cooperative federalism, New York passed "An Act declaring it to be the duty of the Sheriffs of the several counties within this State, to receive and safe keep such prisoners as shall be committed under the authority of the United States." *Journal of the First Session of the Senate of the United States* (April 5, 1790), in 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 278 (1972). Not every State must have chosen to participate, for Congress passed the following further Resolution on March 3, 1791:

> That in case any state shall not have complied with the said recommendation [of September 23, 1789], the marshal in such state, under the direction of the judge of the district, be authorized to hire a convenient place to serve as a temporary jail, and to make the necessary provision for the safekeeping of prisoners committed under the authority of the United States, until permanent provision shall be made by law for that purpose; and the said marshal shall be allowed his reasonable expenses incurred for the above purposes, to be paid out of the Treasury of the United States.

1 PUBLIC STATUTES AT LARGE at 225. The First Congress thus recognized its limited powers under the Constitution: instead of impressing sheriffs to keep federal prisoners, it hired federal marshals to do so.

Only one provision of the Constitution delegates power to Congress to require a State entity to execute federal law without reference to the type of law. U.S. Const., Art.

I, § 8, cl. 15 (power "to provide for calling forth the Militia to execute the Laws of the Union").[18] Pursuant thereto, the Militia Act of May 2, 1792, provided that, "whenever the laws of the United States shall be opposed" by combinations too powerful to be suppressed by the courts or the marshals, the President was authorized "to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed." 1 PUBLIC STATUTES AT LARGE at 264. Militia officers or privates who failed to obey were subject to a court martial.[19] *Id.*

The Militia Act also provided that "the marshals of the several districts and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states." *Id.* at 265. Under the new Constitution, federal laws were executed by federal marshals, and state laws were executed by sheriffs.

The mere enactment of a law by an early Congress is not dispositive of its constitutionality,[20] but constitutional

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[18] *See* U.S. Const., Amend. II ("a well regulated Militia, being necessary to the *security* of a free State").

[19] *See* U.S. Const. Amend. V (indictment for infamous crimes required "except in cases arising . . . in the militia, when in actual service in time of war or public danger").

[20] The Alien and Sedition Acts, 1 Stat. 577 (1798), were not passed under any of Congress' powers and violated the First, Sixth, and Tenth Amendments. James Madison, *Report on Virginia Resolutions*, 4 Elliot, DEBATES at 546, 547. These Acts were "patently unconstitutional by modern standards. If the early Congresses political actions were determinative . . . evidence of constitutional meaning, we

sources are usually easy to find. Respondent overstates the content of early naturalization statutes, which simply "conferred *authority* upon state courts to admit aliens to citizenship."[21] *Holmgren v. United States*, 217 U.S. 509, 517 (1910) (emphasis added). Similarly, the 1882 immigration law cited by respondent (Br. 29) provided that "the Secretary of the Treasury is hereby charged with the duty of executing the provisions of this act," and empowered the Secretary "to enter into contracts with such State commission, board, or officers" designated by a State governor to assist in immigration control. § 2, 22 Stat. 214 (1882). The option to enter into contracts is hardly an example of a coercive command to State officers.

Respondent notes a 1917 law providing that State and local officials assist in draft registration. (Br. 30.) In actuality, the President never issued any orders to the States, and the State governors voluntarily assumed the function. *Amici* Br. of Council of State Governments at 28 n. 29. The mere existence of such legislation, untested by litigation, does not speak to its constitutionality.[22] It is unclear that the Registration Regulations filed by the Solicitor General here

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would have to gut our current First Amendment doctrine . . . ." *Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring).

[21] *Compare* U.S. Const., Art. I, § 8, cl. 4 (Congress has power "to establish a uniform rule of naturalization") *with* Art. VI (State judges bound by federal law). *See Amici* Br. of Council of State Governments *et al.* at 24-25 & n. 22.

[22] "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969).

would pass constitutional muster today.[23]

Current federal laws provide that States shall report missing children and traffic fatalities in exchange for use of the National Crime Information Center (the former) and for highway funds (the latter).[24] (Printz Br. 25 & n. 31.) Contrary to respondent (Br. 31), petitioner sees nothing unconstitutional about such voluntary undertakings.

The Framers anticipated cooperative federalism under which the States would voluntarily assist the federal government and would otherwise be "laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 115 S.Ct. at 1641 (Kennedy, J., concurring). Respondent's oxymoronic concept of "command 'federalism'" has no place in our Constitution.

V. SEVERABILITY

Respondent claims that the waiting period and notification requirements have no impact on Sheriff Printz, who thereby lacks Article III standing to challenge them. (Br. 43.) Yet the Act forces Sheriff Printz to "bear the brunt of public disapproval, while the federal officials who devised

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[23] The Regulations "authorized" officials to act, but also made it a crime for a "duly designated officer" not to assist. *E.g., id.* at 4-5, 23. A separate registration process for "citizens of African descent" was established. *Id.* at 20. Media entities were "called upon" to publish the President's proclamation "in every newspaper" in the United States. *Id.* at 8. It is unclear whether refusal was a crime.

[24] *And see, e.g.*, 42 U.S.C. § 6933(a) (States shall inventory hazardous wastes), (b) (grants for States).

the regulatory program may remain insulated from the electoral ramifications of their decision."[25] *New York*, 505 U.S. at 169. He will be held accountable at the polls if he refuses to check records and to clear sales expeditiously, thereby forcing his constituents to wait five full days to purchase handguns, and also alienating supporters of background checks.

Sheriff Printz will also be held accountable and will be exposed to lawsuits by law-abiding handgun purchasers who value their privacy and want the records about their purchases destroyed. As enactment of the destruction requirement reflects, handgun purchasers, through the exercise of their political influence, oppose perceived local, State, or federal registration of handgun purchasers. Any sheriff who does not destroy the records involuntarily received from dealers will suffer at the polls. A sheriff is not immunized from actions at law for damages for violation of privacy rights. *Cf.* 18 U.S.C. §922(s)(7) (CLEO not liable for damages for failure to prevent transfer to unlawful recipient or for prevention of transfer to lawful recipient).

Ravalli County has 169 licensed firearms dealers (Jt. App. 14a), and the right to purchase a handgun is valued by many voters. *See* Mont. Const., Art. II, §12 ("The right of any person to keep and bear arms in defense of his home, person, and property . . . shall not be called in question"); Mont. Code § 45-8-351(1) ("No . . . local government unit

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[25] The district court found that Sheriff Printz had standing, and ruled on the severability issue. (Pet.App. 33-38a, 61-66a). Both critics and supporters of the Act will hold the sheriff accountable. *Id.* at 53-54a.

may prohibit, register, tax, license, or regulate the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, [or] possession . . . of any . . . handgun.").[26]

While severability was not presented as an issue in the petition for certiorari, Supreme Court Rule 24.1(a) provides that the Court may decide a plain error evident from the record and within its jurisdiction.[27] Deciding the issue now will promote judicial economy. In any case, this Court may not rewrite the law into the version Congress rejected.

Respondent argues that the nonseverability test of *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686, n. 8 (1987), is not met because the Brady Act "amended" the Gun Control Act ("GCA") rather than established a "new program." (Br. 46 n. 32.) The formal use of the word "amended" in the enacting clause does not govern the substance. Before the Brady Act, CLEOs played no part in the execution of the GCA. The Brady Act established a major "new program" for CLEOs, dealers, and purchasers.

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[26] *See Romero v. United States*, 883 F.Supp. 1076, 1080 (W.D.La. 1995) (Brady Act puts sheriff in middle of conflict between voters who believe Act violates right to bear arms and supporters of Act).

[27] Severability was not raised in the question presented in *New York*, but the issue was decided. 505 U.S. at 186-87. While the Ninth Circuit in *Mack* did not reach the severability issue, after the petition was filed, *Koog v. United States*, 79 F.3d 452, 462-63 (5th Cir. 1996) reached the issue. In asking this Court to put the *Koog* petition on hold, the United States suggested that this Court may rule on severability in *Printz*, and thus need not consolidate these cases. *Oscar Gonzalez (J.R. Koog)/Bill McGee v. United States*, No. 95-2077, Br. for U.S. at 3.

Respondent fails to address why Congress would have found an optional check with a mandatory wait acceptable, when Congress repeatedly rejected this scheme and enacted its opposite. The Act does not reflect the desire of some members of Congress for a "cooling off" period. (US Br. 47 n. 33.) Instead, the interim provision exempts States with an instant check (i.e., no waiting period), and the permanent provision establishes a nationwide instant check. *Board of Governors of Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986), instructs:

> Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Respondent claims that the record destruction requirement is severable from the notification requirement, oblivious to Congress' intent to protect privacy rights. (Br. 49-50.) An elected sheriff who is insensitive to the privacy rights of constituents risks defeat in the next election. Respondent ignores Congress' historic rejection of the registration of firearm owners not only by the federal government, but also by State or local governments. § 922(s)(6)(B) imposes the duty to destroy records on local CLEOs. § 926(a) provides that no regulation may require that records required by the GCA "be recorded at or

transferred to a facility owned, managed, or controlled by the United States *or any State or any political subdivision thereof*, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established."[28] (Emphasis added.)

Respondent alleges that record destruction is unnecessary since § 922(s)(6)(B)(iii) prohibits a CLEO from using the information for any purpose other than a record check. Yet Congress intended the destruction requirement to *guarantee* just that. Further, Congress has no power to regulate how a CLEO uses information not voluntarily solicited and not subject to an agreement between the CLEO and the federal government. The destruction requirement is essential to Congress' historic rejection of the registration of firearms owners by local, State, and federal governments, and is not severable from the reporting requirement.

Respondent argues that the duty to explain a denial is severable from the power to veto a handgun transfer where a CLEO voluntarily conducts record searches. (Br. 50.) Yet voluntarily conducting record searches as a service to constituents cannot give rise to a mandatory duty to generate a legal opinion explaining a denial.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

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[28] *See* General Accounting Office, *Federal Firearms Licensee Data* 2-3, 52-58 (1996) (restrictions on federal firearms licensee data).

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